Supreme Court, U.
FILED
DEC 22 201
OFFICE OF THE CL

No. 15-415

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P. CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
(213) 330-4450

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

(Additional Counsel Listed on Inside Cover)

December 22, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
(925) 297-6415

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. The Ninth Circuit's Decision Conflicts With The Decisions Of Several Other Courts. 3

II. Respondents' Defense Of The Ninth Circuit's Reasoning Fails. 6

III. This Case Is An Ideal Vehicle To Address The Scope Of §213(b)(10)(A). 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Brennan v. Deel Motors,
475 F.2d 1095 (5th Cir. 1973) 1, 3, 9

Chevron v. NRDC,
467 U.S. 837 (1984) 5

Christopher v. SmithKline Beecham,
132 S. Ct. 2156 (2012) 10, 11

Integrity Staffing Solutions v. Busk,
135 S. Ct. 513 (2014) 11

Long Island Care v. Coke,
551 U.S. 158 (2007) 5

Mayo Found. v. United States,
562 U.S. 44 (2011) 5

OWCP v. Newport News Shipbuilding,
514 U.S. 122 (1995) 9

Sandifer v. U.S. Steel,
134 S. Ct. 870 (2014) 10

Thompson v. J.C. Billion,
294 P.3d 397 (Mont. 2013) 1, 3, 4, 6

Walton v. Greenbrier Ford,
370 F.3d 446 (4th Cir. 2004) 1, 3, 4, 5

Statutes

29 U.S.C. §213(a)(1) 9

29 U.S.C. §213(b)(10)(A) ..... *passim*

Pub. L. No. 87-30, 75 Stat. 65 (1961) 10

Regulations

29 C.F.R. §779.372(c)(2) 8

76 Fed. Reg. 18,832 (2011) 4

Other Authorities

Br. for United States, *Christopher v. SmithKline Beecham*, No. 11-204 (Feb. 6, 2012) 12

S. Rep. No. 81-640 (1949) 9

REPLY BRIEF FOR PETITIONER

For more than forty years, federal and state courts have uniformly held that service advisors are exempt from the FLSA's overtime-pay requirements because they are "salesm[e]n ... engaged in ... servicing automobiles." 29 U.S.C. §213(b)(10)(A); *Walton v. Greenbrier Ford*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion*, 294 P.3d 397 (Mont. 2013). Those courts have also uniformly refused to defer to the narrow and counter-textual interpretation of §213(b)(10)(A) advanced by the Department of Labor ("DOL"). In the decision below, however, the Ninth Circuit departed from that unbroken line of authority, holding that DOL's interpretation was entitled to controlling deference and that service advisors were not exempt. The court acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11.

Respondents nonetheless deny the existence of a circuit split, arguing that the unbroken line of precedent finding service advisors exempt under §213(b)(10)(A) was somehow washed away by DOL's promulgation of a "new" regulation in 2011. But that regulation was not "new" at all. As Respondents concede, DOL simply adhered to its old position. *See* BIO.24 (DOL "reaffirm[ed]" the agency's "longstanding 1970 interpretive rule"). When an agency considers changing course after losing in multiple circuits, but ultimately decides to stay the course and adhere to its rejected position, it does not magically sweep away the adverse precedent and start

anew with a clean slate. To the contrary, when an agency declines to acquiesce in the face of adverse circuit precedent and then convinces another circuit to adopt its view, the issue becomes ripe for this Court's review.

Respondents' defense of the Ninth Circuit's decision on the merits fares no better. The disjunctive language of §213(b)(10)(A) exempts "any salesman" engaged in "selling *or servicing* automobiles." Yet Respondents—like the Ninth Circuit—would simply read the latter portion of the phrase out of the statute. Every other court to consider this issue has correctly recognized that a service advisor is a paradigmatic example of a "salesman ... engaged in ... servicing automobiles."

Finally, Respondents' attempt to minimize the importance of this issue is unavailing. As amici note, the decision below has serious practical implications for the nearly 50,000 service advisors at more than 18,000 dealerships nationwide. And the issue was important enough for Congress to provide an exemption directly focused on dealerships. The fact that service advisors might potentially be covered by different, less specific, and more burdensome exemptions to the FLSA is no reason to tolerate an ongoing circuit split over the meaning of §213(b)(10)(A). And Respondents blink reality by pointing to the relative paucity of recent reported cases on this issue as a reason to deny certiorari. The obvious reason for that absence of cases is the complete absence of any case law supporting the interpretation of §213(b)(10)(A) embraced by the Ninth Circuit here. If the decision below is left

undisturbed, there will be no shortage of lawsuits seeking windfall recoveries. The Ninth Circuit's decision dramatically upsets that once-settled body of precedent, and this Court's intervention is warranted to restore uniformity to this important area of the law.

I. The Ninth Circuit's Decision Conflicts With The Decisions Of Several Other Courts.

Federal and state courts have uniformly held for decades that service advisors are exempt under §213(b)(10)(A) because they are "salesm[e]n ... primarily engaged in ... servicing automobiles." *See* Pet.18-23; *Walton*, 370 F.3d 446; *Brennan*, 475 F.2d 1095; *Thompson*, 294 P.3d 397 The Ninth Circuit candidly acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11. Respondents (at 9-15) nonetheless deny the existence of a split, but their arguments are wholly without merit.

A. Respondents' principal submission is that there is no circuit split because DOL's 2011 regulation was a watershed event that called into question the earlier decisions interpreting §213(b)(10)(A). Because the cases that conflict with the decision below "arose before 2011," Respondents contend (at 10-15) that there is no current split of authority that warrants this Court's intervention.

But, as Respondents concede (at 24), DOL's 2011 regulation simply "reaffirm[ed] its longstanding 1970 interpretive rule." Indeed, after actively considering acquiescing in the wall of adverse decisions, DOL expressly "*decided not to adopt*" a "proposed change" to its interpretive regulation. 76 Fed. Reg. 18,832,

18,838 (2011) (emphasis added). DOL ultimately declined to acquiesce and stuck by the very same counter-textual interpretation of §213(b)(10)(A) advanced in the 1970 regulation and rejected by every court to consider it. But having adhered to its earlier position, DOL did not somehow wipe the slate clean.

Respondents do not cite a single case suggesting that an agency's re-promulgation of a rule in nearly identical form—based on the *same rationale* as the original rule—can wipe out adverse precedent. If DOL wanted to eliminate the possibility of a circuit split, it could have acquiesced in the adverse decisions. With DOL having done the opposite, and the Ninth Circuit then adopting DOL's minority position, the stage is now set for this Court's review.

In all events, the 2011 regulation did not—and could not—change the text of §213(b)(10)(A), which was the basis for the lower courts' rejection of DOL's position. The Fourth Circuit rejected DOL's "impermissibly restrictive construction of the statute," and found DOL's regulatory definition "flatly contrary to the statutory text." *Walton*, 370 F.3d at 451-52. And the Montana Supreme Court similarly held that service advisors were exempt under a "plain, grammatical reading" of the exemption because they are "salesmen ... primarily engaged in ... servicing automobiles." *Thompson*, 294 P.3d at 402. Those decisions were grounded in the unambiguous text of §213(b)(10)(A), which DOL has no power to change—through a "new" regulation or otherwise.

B. Respondents further contend (at 13-14) that the many decisions finding service advisors exempt are no longer good law in light of *Long Island Care v.*

Coke, 551 U.S. 158 (2007), and *Mayo Foundation v. United States*, 562 U.S. 44 (2011). But *Long Island* and *Mayo* simply clarified that the *Chevron* framework applies to interpretive regulations, including those promulgated under the FLSA. *See Long Island*, 551 U.S. at 171-72; *Mayo*, 562 U.S. at 52-58. That holding had no effect on the decisions finding service advisors exempt under §213(b)(10)(A).

In *Walton*, for example, the Fourth Circuit gave DOL's position "considerable weight" and would have upheld that rule if it had "implement[ed] the congressional mandate in a reasonable manner." 370 F.3d at 452. *Chevron*, *Long Island*, and *Mayo* provide no greater deference than that. *See Chevron v. NRDC*, 467 U.S. 837, 844 (1984) (court must defer to a "reasonable interpretation made by the administrator of an agency"); *Long Island*, 551 U.S. at 173 (agency action should be upheld if it "falls within the statutory grant of authority" and "is reasonable"). The Fourth Circuit ultimately refused to defer to DOL's interpretation because it was an unreasonable interpretation of the statute. Neither *Mayo* nor *Long Island* requires acceptance of an unreasonable agency interpretation.

Respondents' assertion (at 14-15) that the Montana Supreme Court's post-*Mayo* and post-*Long Island* decision in *Thompson* is no longer good law is even weaker. Respondents conveniently ignore that the *Thompson* decision not only post-dated *Long Island* but actually *cited* and *applied* it. As the court explained, the plaintiff's "reliance on *Chevron* and *Long Island* is unavailing because those cases involved regulations that defined statutory terms *in a*

way that did not conflict with the controlling statute." *Thompson*, 294 P.3d at 402 (emphasis added). The Montana Supreme Court faithfully applied the two-step *Chevron* framework and concluded at step one that DOL's counter-textual interpretation was not entitled to deference.[1]

In sum, although the Ninth Circuit badly misconstrued the text of §213(b)(10)(A), *see infra*, the court was exactly right to acknowledge that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana," Pet.App.11.

II. Respondents' Defense Of The Ninth Circuit's Reasoning Fails.

It is not surprising that the Ninth Circuit's decision is an outlier, as that decision rested on an untenable interpretation of §213(b)(10)(A). Pet.23-33. The FLSA exempts from the overtime requirements "any salesman ... primarily engaged in selling or servicing automobiles." Either gerund—"selling" or "servicing"—can sensibly be applied to the noun "salesman." Because a service advisor is the paradigmatic "salesman ... engaged in ... servicing automobiles," that should be the end of the inquiry under *Chevron*.

---

[1] Respondents suggest (at 15-17) that Petitioners are seeking "less than full *Chevron* deference" for DOL's regulations. That is incorrect. Petitioners argued that DOL's position is not entitled to deference under *any* relevant standard (*Chevron* or otherwise) because it is contrary to the text of §213(b)(10)(A) or, at a minimum, is an unreasonable interpretation of the statute. Pet.23-33.

Respondents nonetheless assert (at 17-18) that Congress' failure to use the specific term "service advisors" in the statutory text is somehow dispositive under the canon *expressio unius est exclusio alterius*. But there was no need for Congress to include the narrower term "service advisors" because it expressly included the umbrella term "*any salesman* ... engaged in selling or servicing automobiles." Respondents do not dispute that service advisors are salesmen who sell services. *See* BIO.18 ("a salesman is one who sells something, making a sale").

Respondents also attempt to rewrite the statute by adding restrictive modifiers that appear nowhere in the text. On multiple occasions, Respondents casually describe §213(b)(10)(A) as exempting "car salesmen" (at 1) or "automobile salesmen" (at 9, 16). Respondents might wish that the statute were limited to "car salesmen," but the exemption contains no such limitation. Rather, the FLSA exempts "any salesman ... engaged in ... selling *or servicing* automobiles." §213(b)(10)(A) (emphasis added).[2]

The Ninth Circuit acknowledged that "[s]ervice advisors may be 'salesmen' in a generic sense," but found them to be non-exempt because they "do not *personally* sell cars and they do not *personally* service cars." Pet.App.13 (emphasis added). But, as Petitioner explained, nothing in the statute requires that a salesman, mechanic, or partsman be *personally*

---

[2] Respondents (at 18-19) offer examples of salesmen who are not exempt. But, unlike service advisors, salesmen who sell warranties, underbody coatings, or insurance are not primarily engaged in either selling automobiles or servicing them.

involved in servicing in order to be exempt. *See* Pet.25-26.

Respondents (at 20) now backtrack from the Ninth Circuit's view, asserting that DOL has never imposed a requirement of personal involvement. But abandoning the reasoning of the only court ever to side with DOL is a dangerous business, because without injecting the requirement of personal involvement, DOL's counter-textual interpretation cannot be saved. Of course, by adding that requirement to the statutory text, the Ninth Circuit created a significant anomaly with respect to "partsmen," who are expressly included in the statute yet are not *personally* engaged in either selling or servicing automobiles. The Ninth Circuit's interpretation would thus write partsmen out of the statute altogether. Pet.25-27 Respondents insist (at 21-22) that there may be a partsman or two who also personally service automobiles. But no one, including DOL, seriously believes that Congress was trying to exempt that rara avis, while leaving the vast majority of true partsmen non-exempt. *See* 29 C.F.R. §779.372(c)(2) (defining "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts"). Congress' inclusion of partsmen in §213(b)(10)(A) thus destroys the reasoning of the only court to adopt DOL's view.

Respondents (at 22) reprise the Ninth Circuit's stylized analogy about a reference to "barking or meowing" "dogs or cats." But that analogy—and its companion involving "eating or drinking" pets—merely illustrates that statutory context matters. *See* Pet.27-29. Here, the statutory context makes clear

that a service advisor is a salesman primarily engaged in servicing automobiles. And Respondents have no response to the fact that the inclusion of partsmen in the exemption conclusively demonstrates that Congress could not have intended a one-to-one mapping of nouns to gerunds in §213(b)(10)(A). Pet.28-29.

Treating service advisors as non-exempt also makes little sense in the context of the broader FLSA regulatory scheme. Pet.30-31. Numerous provisions of the FLSA recognize that it is both common and reasonable for salesmen to be compensated based on their *success at selling* rather than the sheer number of hours worked. *See, e.g.*, 29 U.S.C. §213(a)(1) (excluding "any employee employed ... in the capacity of outside salesman"); *Brennan*, 475 F.2d at 1097 (salesmen "are more concerned with their total work product than with the hours performed."). Respondents do not even attempt to argue that forcing service advisors into an ill-fitting hourly compensation regime would advance the policy goals underlying the FLSA. Indeed, as amici note, service advisors in several states within the Ninth Circuit earn an average of $75,769 per year, and the top 10% earn on average $105,583. NADA Br. 7. This is not a case that implicates the FLSA's core concern of protecting workers from "wages too low to buy the bare necessities of life," S. Rep. No. 81-640 at 3 (1949).

Finally, Respondents (at 22) turn to "that last redoubt of losing causes," *OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995)—the anti-employer canon that exemptions to the FLSA should be construed "narrowly." That purported canon has

no basis in this Court's modern jurisprudence, and in recent years the Court has typically cited it only in the course of *declining* to apply it. *See, e.g., Sandifer v. U.S. Steel*, 134 S. Ct. 870, 879 n.7 (2014) (reserving question of whether Court should "disapprove" anti-employer canon); *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2172 n.21 (2012) (canon does not apply to FLSA's definitions). The Ninth Circuit's reliance on that questionable rule only underscores the tenuous nature of its holding. The FLSA and its exemptions should be construed neither narrowly nor broadly, but fairly and correctly.[3]

III. This Case Is An Ideal Vehicle To Address The Scope Of §213(b)(10)(A).

This case presents an excellent vehicle for this Court to resolve an acknowledged circuit split over whether tens of thousands of "service advisors" who work at car and truck dealerships are exempt from the FLSA's overtime-pay requirements. Respondents seek to impose significant FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. This Court has repeatedly rejected such attempts, *see, e.g., Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513

---

[3] Respondents suggest (at 9) that exempting service advisors would "reenact the blanket automobile dealership exemption that Congress repealed in 1966." But the blanket exemption covered *everyone* working at a dealership, including typically non-exempt employees such as porters, cashiers, and janitors. *See* Pub. L. No. 87-30, §9, 75 Stat. 65 (1961). Those employees—who are neither salesmen, partsmen, nor mechanics—will be unaffected by the Court's decision in this case.

(2014); *Christopher*, 132 S. Ct. 2156, and should do so again here.

As amici explain, there are more than 18,000 franchised car dealerships nationwide, which collectively employ an estimated 45,000 service advisors. *See* NADA Br.6. Those dealerships and their employees have negotiated mutually beneficial compensation plans in good-faith reliance on the unbroken line of authority finding service advisors to be exempt. The Ninth Circuit's decision will require dealerships and their employees to rework their longstanding relationships in ways that will be harmful to both and will do nothing to advance the purposes of the FLSA.

Respondents (at 26-27) make the curious assertion that this issue is of limited importance because there have been few recent cases addressing whether service advisors are exempt. But there is actually a very good explanation for this "paucity of precedent": plaintiffs have had no reason to bring such cases because, for more than forty years, *every court to consider the issue* had found service advisors to be exempt. But now that one particularly ambitious plaintiff has procured a deviating circuit precedent—by the most populous circuit, no less—there will be no lack of plaintiffs willing to seek windfall recoveries for employees who were compensated pursuant to industry custom and previously uniform precedent.

Respondents further contend (at 26) that this Court's review is unnecessary because service advisors might also fall within the more general exemption for commissioned employees under §207(*i*). But the potential availability of a different—less

specific and more burdensome, *see* NADA Br.7-8, 12—exemption cannot justify ongoing disuniformity over the scope of §213(b)(10)(A). Indeed, in *Christopher*, this Court granted certiorari to address a circuit split over the scope of the "outside sales" exemption even though the employees in question were potentially covered by another exemption. *See* Br. for United States at 16 n.3, *Christopher v. SmithKline Beecham*, No. 11-204 (Feb. 6, 2012). Congress deemed the treatment of certain dealership employees sufficiently important to provide a specific exemption for them. This Court should not allow the Ninth Circuit to render that provision a dead letter for service advisors merely because they might be covered by another, more general exemption as well.[4]

Finally, Respondents assert (at 27) that this case is a poor vehicle because discovery is needed regarding "service advisors' roles and responsibilities." But Respondents' complaint precisely articulates the "roles and responsibilities" they assumed at the dealership. Respondents do not identify any other facts or evidence that would be needed to shed light on the relevant issues. This Court—like the district court and the Ninth Circuit—need only resolve the pure legal question of whether §213(b)(10)(A) means what it says when it exempts "any salesman ... primarily engaged in ... servicing automobiles." The Court should grant certiorari to make clear that service

---

[4] Respondents (at 27) also offer vague assurances about the limits on FLSA collective actions. *Christopher* and *Integrity Staffing* were also FLSA collective actions, yet the limitations on such cases did not prevent this Court from granting certiorari to resolve circuit splits.

advisors nationwide are covered by the exemption's plain language.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P. CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
(213) 330-4450

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
(925) 297-6415

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

December 22, 2015